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SENATE BILL 225

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Bernadette M. Sanchez

AN ACT

RELATING TO FINANCIAL INSTITUTIONS; ENACTING THE DEFERRED DEPOSIT LOAN ACT; REQUIRING LICENSURE; PROVIDING POWERS AND DUTIES; REQUIRING RECORDS AND REPORTS; LIMITING CHARGES FOR LOANS; PRESCRIBING CRIMINAL AND CIVIL PENALTIES; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1 through 14 of this act may be cited as the "Deferred Deposit Loan Act".

Section 2. [NEW MATERIAL] DEFINITIONS. -- As used in the Deferred Deposit Loan Act:

A. "check" means a negotiable instrument, as defined in Section 55-3-104 NMSA 1978, that is drawn on a financial institution and is to be payable on demand at

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1 maturity of a deferred deposit loan;

2 B. "consumer" means a natural person who,
3 individually or jointly with another natural person, enters
4 into a deferred deposit loan;

5 C. "deferred deposit loan" means a transaction in
6 which a person lends money to a consumer by:

7 (1) accepting a check dated on the date it was
8 written and agreeing to hold it for a specific period of days
9 prior to deposit or presentment; or

10 (2) accepting a check dated subsequent to the
11 date it was written and agreeing to hold the check for deposit
12 until the date written on the check;

13 D. "division" means the financial institutions
14 division of the regulation and licensing department;

15 E. "facilitator" means a person that is exempt from
16 licensing and that facilitates, enables or acts as a conduit
17 for another person to make a deferred deposit loan, including:

18 (1) banks;
19 (2) savings and loan associations;
20 (3) credit unions; and
21 (4) other state-regulated or federally
22 regulated financial institutions;

23 F. "licensee" means a person licensed to make
24 deferred deposit loans or a facilitator; and

25 G. "person" means a natural person, firm,

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1 partnership, association or corporation, or other entity that
2 makes a deferred deposit loan in this state.

3 Section 3. [NEW MATERIAL] EXEMPTION. -- Retail sellers who
4 cash checks incidental to or independent of a sale and who
5 charge no more than two dollars (\$2.00) per check for the
6 service are exempt from the provisions of the Deferred Deposit
7 Loan Act.

8 Section 4. [NEW MATERIAL] LICENSING REQUIREMENTS AND
9 FEES-- NUMBER AND PLACE OF BUSINESS. --

10 A. A person shall not engage in the business of
11 deferred deposit lending without a license issued by the
12 division. The division shall not issue or renew a license
13 until determining:

14 (1) that authorizing the applicant to engage
15 in deferred deposit lending promotes the convenience and
16 advantage of the community in which the applicant proposes to
17 engage in business;

18 (2) that the applicant has unencumbered assets
19 of at least twenty-five thousand dollars (\$25,000) per license;
20 and

21 (3) other information the division deems
22 necessary.

23 B. A license shall not be issued for longer than
24 one year, and a license shall not be renewed if the licensee
25 has violated the Deferred Deposit Loan Act.

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1 C. A licensee shall post a bond in the amount of
2 fifty thousand dollars (\$50,000) per license, which shall
3 continue in effect for five years after the licensee ceases
4 operation in the state. The bond shall be available to pay
5 damages and penalties to consumers harmed by any violation of
6 the Deferred Deposit Loan Act.

7 D. An application fee of five hundred dollars
8 (\$500) with a renewal fee of three hundred dollars (\$300) and
9 an investigative fee of five hundred dollars (\$500) shall be
10 paid by a licensee.

11 E. More than one place of business shall not be
12 maintained under the same license, but the division may issue
13 more than one license to the same licensee.

14 F. A licensee shall not make deferred deposit loans
15 within an office, suite, room or place of business in which any
16 other business is solicited or engaged in, unless the division
17 finds that the other business is not contrary to the best
18 interest of consumers and is authorized by the division in
19 writing.

20 G. By accepting the license, the applicant agrees
21 that he will not use the criminal process to collect the
22 payment of deferred deposit loans.

23 Section 5. [NEW MATERIAL] PUBLIC HEARINGS--REVOCATION AND
24 SUSPENSION OF LICENSE. --

25 A. A public hearing shall be held for license

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1 renewals if requested in writing by the division or by five or
2 more members of the public.

3 B. If the division finds, after due notice and
4 hearing or opportunity for hearing, that a licensee or officer,
5 agent, employee or representative of the licensee has violated
6 any of the provisions of the Deferred Deposit Loan Act or rules
7 promulgated pursuant to that act, failed or refused to make its
8 reports to the division or furnished false information to the
9 division, the division may issue an order suspending or
10 revoking the license. Revocation, suspension or surrender of a
11 license shall not relieve the licensee from civil or criminal
12 liability.

13 Section 6. [NEW MATERIAL] DUTIES. --

14 A. The division shall:

- 15 (1) maintain a list of licensees that is
16 available to interested persons and the public;
- 17 (2) create a toll-free telephone number at
18 which consumers may obtain information about licensees;
- 19 (3) establish a complaint process whereby an
20 aggrieved consumer or other person may file a complaint against
21 a licensee;
- 22 (4) upon the request of a party to a
23 complaint, hold public hearings in order to:
- 24 (a) make findings of fact and
25 conclusions of law;

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- (b) issue cease and desist orders;
- (c) suspend or revoke a license granted pursuant to the Deferred Deposit Loan Act; or
- (d) refer the matter to the appropriate law enforcement agency for prosecution; and
- (5) compile annual reports of deferred deposit lending in this state from the information provided pursuant to Section 7 of the Deferred Deposit Loan Act and provide copies to the governor and the legislature. Annual reports shall be available to the public.

B. The division may promulgate rules to carry out the provisions of the Deferred Deposit Loan Act.

Section 7. [NEW MATERIAL] RECORDS AND REPORTS. --

A. A licensee shall keep books, accounts and records required by the division that enable the division to determine if the licensee is complying with the provisions of the Deferred Deposit Loan Act. The division may examine the records at any reasonable time. All records required by this section shall be kept for four years following the last entry on a loan.

B. A licensee shall file an annual report with the division on or before the last day of March for the preceding calendar year ending December 31 on forms prescribed by the division. The report shall disclose in detail and under appropriate headings:

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1 (1) the resources, assets and liabilities of
2 the licensee at the beginning and end of the time period;

3 (2) the income, expense, gain and loss and a
4 reconciliation of surplus or net worth with the balance sheets;
5 and the ratios of the profits to the assets reported;

6 (3) the total number of deferred deposit loans
7 made during the time period;

8 (4) the total number of deferred deposit loans
9 outstanding as of the last day of the time period;

10 (5) the minimum, maximum and average dollar
11 amount of checks that were deferred during the time period;

12 (6) the average annual percentage rate and the
13 average number of days a deposit of a check is deferred during
14 the time period;

15 (7) the total of returned checks, the total of
16 checks recovered and the total of checks charged off during the
17 time period; and

18 (8) verification that the licensee has not
19 used the criminal process in the collection of any deferred
20 deposit loan during the time period.

21 C. If a licensee conducts another business or is
22 affiliated with another licensee or if any other situation
23 exists under which allocations of expenses are necessary, the
24 licensee shall make allocations according to appropriate and
25 reasonable accounting principles as approved by the division.

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1 Information about other business conducted on the same premises
2 as that of deferred deposit loans shall be provided as required
3 by the division.

4 D. A licensee shall file a copy of the deferred
5 deposit loan contract and fee schedule with the division prior
6 to commencement of business, at the time any changes are made
7 to the contract or schedule and annually upon renewal of the
8 license. These documents shall be available to interested
9 parties and to the general public.

10 Section 8. [NEW MATERIAL] REQUIRED ACTS. --

11 A. A check written by a consumer for a deferred
12 deposit loan shall be made payable to the licensee.

13 B. Upon receipt of a check from a consumer for a
14 deferred deposit loan, the licensee shall immediately stamp the
15 back of the check with an endorsement that states: "This check
16 is being negotiated as part of a deferred deposit loan, and any
17 holder of this check takes it subject to all claims and
18 defenses of the maker.". A subsequent holder or assignee of a
19 check written by a consumer for a deferred deposit loan takes
20 the instrument subject to all claims and defenses of the
21 consumer.

22 C. The minimum term for a deferred deposit loan is
23 two weeks for each fifty dollars (\$50.00) owed on the loan.

24 D. The minimum amount of a deferred deposit loan is
25 fifty dollars (\$50.00).

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1 E. The maximum amount of a deferred deposit loan is
2 three hundred dollars (\$300).

3 F. A consumer may make partial payments of not less
4 than five dollars (\$5.00) on a deferred deposit loan at any
5 time without charge.

6 G. After each payment made on a deferred deposit
7 loan, the licensee shall give to the consumer a signed, dated
8 receipt showing the amount paid and the balance due on the
9 loan.

10 H. A licensee shall provide each consumer with a
11 copy of all loan documents prior to the consummation of the
12 loan.

13 Section 9. [NEW MATERIAL] REQUIRED DISCLOSURES. --

14 A. A licensee shall deliver to a consumer before
15 entering into a deferred deposit loan a pamphlet prepared by
16 the division that explains, in simple English and Spanish, all
17 of the consumer's rights and responsibilities in a deferred
18 deposit loan transaction. The pamphlet shall:

19 (1) include the division's toll-free telephone
20 number to receive concerns or complaints by consumers and to
21 inform consumers as to whether complaints against the licensee
22 have been filed with the division and how the complaints were
23 resolved; and

24 (2) inform consumers that the division can
25 provide information about whether a lender is licensed.

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1 B. A licensee shall provide a consumer with a
2 contract specified or approved by the division that may be kept
3 by the consumer and that includes the following information in
4 English and in the language in which the loan was negotiated:

5 (1) the name, address and telephone number of
6 the licensee making the deferred deposit loan, and the name and
7 title of the individual employee who signs the agreement on
8 behalf of the licensee;

9 (2) an itemization of the fees and interest
10 charges to be paid by the consumer;

11 (3) disclosures required by the federal Truth
12 in Lending Act, regardless of whether the Truth in Lending Act
13 applies to the particular deferred deposit loan;

14 (4) disclosures required pursuant to state
15 law;

16 (5) a clear description of the consumer's
17 payment obligations pursuant to the loan; and

18 (6) in a manner that is more conspicuous than
19 the other information provided in the contract and in at least
20 fourteen-point bold typeface located immediately preceding the
21 signature of the consumer, the statement "You cannot be
22 prosecuted in criminal court to collect this loan."

23 C. A notice in simple English and Spanish shall be
24 conspicuously posted by a licensee in each location of a
25 business providing deferred deposit loans. The notice shall:

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1 (1) inform consumers that it is illegal for
2 the licensee to use the criminal process against a consumer to
3 collect on any deferred deposit loan; and

4 (2) display the schedule of all interest and
5 fees to be charged on a deferred deposit loan, with an example
6 of the amounts that would be charged on a three hundred dollar
7 (\$300) loan payable in fourteen days and thirty days and giving
8 the corresponding annual percentage rate.

9 D. Licensees that make deferred deposit loans and
10 are exempt from the fee limitations of the Deferred Deposit
11 Loan Act and that charge fees, interest and charges greater
12 than those authorized in the Deferred Deposit Loan Act shall
13 post in a conspicuous place in the branch in which deferred
14 deposit loans are transacted the following notice: "WARNING:
15 The fees and interest charged on deferred deposit loans made at
16 this institution are higher than those charged at other
17 financial institutions.". A single instance of charging a
18 consumer more than the fees, interest and other charges
19 permitted in the Deferred Deposit Loan Act shall require the
20 licensee to post this notice.

21 Section 10. [NEW MATERIAL] PERMITTED CHARGES AND FEES. --

22 A. A licensee shall not charge or receive, directly
23 or indirectly, any interest, fees or charges except those
24 specifically authorized by this section.

25 B. A licensee may charge an administrative fee of
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1 no more than five dollars (\$5.00) for each deferred deposit
2 loan entered into with a consumer.

3 C. In addition to the administrative fee, a
4 licensee may charge interest on the amount of cash delivered to
5 the consumer in a deferred deposit loan in an amount no greater
6 than thirty-six percent a year. The rate charged on the
7 outstanding balance after maturity shall not be greater than
8 the rate charged during the loan term. Charges on deferred
9 deposit loans shall be computed and paid only as a percentage
10 of an unpaid principal balance. As used in this section,
11 "principal balance" means the balance due and owed exclusive of
12 any interest, service charges or other loan-related charges.

13 D. If there are insufficient funds to pay a check
14 on the date of presentment, a licensee may charge a fee not to
15 exceed the lesser of fifteen dollars (\$15.00) or the fee
16 imposed upon the licensee by the financial institution. Only
17 one such fee may be collected with respect to a particular
18 check even if it has been redeposited and returned more than
19 once. A fee charged pursuant to this subsection shall be a
20 licensee's exclusive charge for late payment.

21 E. When a loan is repaid before its due date,
22 unearned interest charges shall be rebated to the consumer
23 based on a method at least as favorable to the consumer as the
24 actuarial method.

25 Section 11. [NEW MATERIAL] PROHIBITED ACTS. -- The

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1 following acts are prohibited:

2 A. engaging in deferred deposit lending without
3 first obtaining a license;

4 B. threatening to use or using the criminal process
5 in this or any other state to collect on a loan;

6 C. altering the date or any other information on a
7 check accepted for a deferred deposit loan;

8 D. using a device or agreement that would have the
9 effect of charging or collecting more fees, charges or interest
10 than allowed by the Deferred Deposit Loan Act, including
11 entering into a different type of transaction with the
12 consumer;

13 E. engaging in unfair, deceptive or fraudulent
14 practices in the making or collecting of a deferred deposit
15 loan;

16 F. entering into a deferred deposit loan when the
17 amount of the loan exceeds twenty-five percent of the
18 consumer's net income for the term of the loan;

19 G. charging to cash a check representing the
20 proceeds of a deferred deposit loan;

21 H. using or attempting to use a check provided by a
22 consumer for a deferred deposit loan as security for purposes
23 of any state or federal law;

24 I. making more than one deferred deposit loan to a
25 consumer at a time;

1 J. making a deferred deposit loan that when
2 combined with another outstanding deferred deposit loan owed to
3 another licensee, exceeds a total of three hundred dollars
4 (\$300) when combining the face amount of the checks written in
5 connection with each loan. The licensee shall make inquiry of
6 the consumer or use available information bases to determine
7 whether such loans are outstanding. In any event, a licensee
8 shall not make a loan to a consumer who has two or more
9 deferred deposit loans outstanding, regardless of the total
10 value of the loans;

11 K. renewing, repaying, refinancing or consolidating
12 a deferred deposit loan with the proceeds of another deferred
13 deposit loan made by the same consumer. Upon termination of a
14 deferred deposit loan through the payment of a consumer's check
15 by the drawee financial institution, the return of a check to a
16 consumer who redeems it for consideration or any other method
17 of termination of the loan, the licensee shall not enter into
18 another deferred deposit loan with the same consumer for at
19 least thirty days thereafter; provided that a licensee may
20 extend the term of the loan beyond the due date without charge;

21 L. accepting collateral for a deferred deposit
22 loan;

23 M charging interest, fees or charges other than
24 those specifically authorized by the Deferred Deposit Loan Act,
25 including:

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- 1 (1) charges for insurance; and
- 2 (2) attorney fees or other collection costs;
- 3 N. threatening to take action against a consumer
- 4 that is prohibited by the Deferred Deposit Loan Act or making
- 5 misleading or deceptive statements regarding the deferred
- 6 deposit loan or any consequence thereof;
- 7 O. making a misrepresentation of a material fact in
- 8 obtaining or attempting to obtain a license;
- 9 P. including any of the following provisions in
- 10 contracts required by the Deferred Deposit Loan Act:
- 11 (1) a hold harmless clause;
- 12 (2) a confession of judgment clause;
- 13 (3) a waiver of the right to a jury trial, if
- 14 applicable, in any action brought by or against a consumer;
- 15 (4) a mandatory arbitration clause;
- 16 (5) an assignment of or order for payment of
- 17 wages or other compensation for services;
- 18 (6) a provision in which a consumer agrees not
- 19 to assert any claim or defense arising out of the contract; or
- 20 (7) a waiver of any provision of the act; or
- 21 Q. selling insurance of any kind, whether sold or
- 22 not sold in connection with the making or collection of a
- 23 deferred deposit loan.

24 Section 12. [NEW MATERIAL] CIVIL PENALTIES AND
25 REMEDIES. --

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1 A. A violation of the Deferred Deposit Loan Act,
2 except as the result of accidental or bona fide error of
3 computation, renders the loan void, and the licensee shall have
4 no right to collect, receive or retain any principal, interest
5 or other charges whatsoever with respect to the loan.

6 B. A person found to have violated the Deferred
7 Deposit Loan Act shall be liable to a consumer for actual,
8 consequential and punitive damages plus statutory damages of
9 one thousand dollars (\$1,000) for each violation, plus costs
10 and attorney fees.

11 C. A consumer may sue for injunctive and other
12 appropriate equitable relief to stop a person from violating
13 provisions of the Deferred Deposit Loan Act.

14 D. A consumer may bring a class action suit to
15 enforce the Deferred Deposit Loan Act.

16 E. The remedies provided in this section are not
17 intended to be exclusive remedies available to a consumer nor
18 shall the consumer exhaust any administrative remedies provided
19 pursuant to the Deferred Deposit Loan Act or any other
20 applicable law.

21 Section 13. [NEW MATERIAL] CRIMINAL PENALTIES. -- A
22 licensee, including members, officers and directors of the
23 licensee, that knowingly violates the Deferred Deposit Loan Act
24 is guilty of a petty misdemeanor and, on conviction, is subject
25 to imprisonment not to exceed six months and a fine of not more

1 than one thousand dollars (\$1,000) or both.

2 Section 14. [NEW MATERIAL] APPLICABILITY. --

3 A. The Deferred Deposit Loan Act applies to any
4 person that, for a fee, service charge or other consideration:

5 (1) makes a deferred deposit loan; or

6 (2) facilitates, enables or acts as a conduit
7 for another person that makes deferred deposit loans.

8 B. The provisions of the Deferred Deposit Loan Act,
9 except the requirements for obtaining a license and the
10 limitations on interest rates and fees where exempt by virtue
11 of other state or federal laws, shall apply to banks, savings
12 and loan associations, credit unions and other state-regulated
13 or federally regulated financial institutions.

14 Section 15. Section 58-15-3 NMSA 1978 (being Laws 1955,
15 Chapter 128, Section 3, as amended) is amended to read:

16 "58-15-3. APPLICABILITY OF ACT--EXEMPTIONS--EVASIONS--
17 PENALTY. --

18 A. No person shall engage in the business of
19 lending in amounts of two thousand five hundred dollars
20 (\$2,500) or less without first having obtained a license from
21 the director. Nothing contained in this subsection shall
22 restrict or prohibit a licensee under the New Mexico Small Loan
23 Act of 1955 from making loans in any amount under the New
24 Mexico Bank Installment Loan Act of 1959 in accordance with the
25 provisions of Section 58-7-2 NMSA 1978.

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1 B. Nothing in the New Mexico Small Loan Act of 1955
2 shall apply to a person making individual advances of two
3 thousand five hundred dollars (\$2,500) or less under a written
4 agreement providing for a total loan or line of credit in
5 excess of two thousand five hundred dollars (\$2,500) for which
6 real estate is pledged as collateral.

7 C. Any banking corporation, savings and loan
8 association or credit union operating under the laws of the
9 United States or of New Mexico shall be exempt from the
10 licensing requirements of the New Mexico Small Loan Act of
11 1955, nor shall that act apply to any business transacted by
12 any such person under the authority of and as permitted by any
13 such law, nor to any bona fide pawnbroking business transacted
14 under a pawnbroker's license, nor to a deferred deposit loan
15 business operating pursuant to the Deferred Deposit Loan Act,
16 nor to bona fide commercial loans made to dealers upon personal
17 property held for resale. Nothing contained in the New Mexico
18 Small Loan Act of 1955 shall be construed as abridging the
19 rights of any of those exempted from the operations of that act
20 from contracting for or receiving interest or charges not in
21 violation of any existing applicable statute of this state.

22 D. The provisions of Subsection A of this section
23 apply to any person owning any interest, legal or equitable, in
24 the business or profits of any licensee whose name does not
25 specifically appear on the face of the license, except a

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1 stockholder in a corporate licensee, and to any person who
2 seeks to evade its application by any device, subterfuge or
3 pretense whatsoever, including but not thereby limiting the
4 generality of the foregoing: the loan, forbearance, use or
5 sale of credit (as guarantor, surety, endorser, comaker or
6 otherwise), money, goods or things in action; the use of
7 collateral or related sales or purchases of goods or services
8 or agreements to sell or purchase, whether real or pretended;
9 receiving or charging compensation for goods or services,
10 whether or not sold, delivered or provided; and the real or
11 pretended negotiation, arrangement or procurement of a loan
12 through any use or activity of a third person, whether real or
13 fictitious.

14 E. Any person, copartnership, trust and the
15 trustees or beneficiaries thereof, association or corporation
16 and the several members, officers, directors, agents and
17 employees thereof who violate or participate in the violation
18 of any provision of Subsection A of this section is guilty of a
19 petty misdemeanor and upon conviction shall be sentenced
20 pursuant to the provisions of Subsection B of Section 31-19-1
21 [~~(B)~~] NMSA 1978. Any contract or loan in the making or
22 collection of which any act is done that violates Subsection A
23 or D of this section is void and the lender has no right to
24 collect, receive or retain any principal, interest or charges
25 whatsoever. "

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1 Section 16. EFFECTIVE DATE. --The effective date of the
2 provisions of this act is July 1, 2003.

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